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No._____

In The

Supreme Court of the United States

RICHARD BARRETT,

Petitioner

vs.

UNIVERSITY OF MISSISSIPPI, ET AL,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Pro Se

7088

QUESTIONS PRESENTED

1. Are those engaging in expressive activities during school activities entitled to the same First Amendment protections as students and teachers?

2. May expressive conduct at a school, which does not cause any substantial disruption, under circumstances in which administrators seek to ban such speech because of its content, be permitted under the First and Fourteenth Amendments?

3. Were utterances, circumstances, equal protection, overbreadth, vagueness and other points duly raised below to challenge "game management" regulations and are they now properly before the court either by way of appeal, as part of a facial challenge or *de novo*?

PARTIES TO THE PROCEEDINGS

Petitioner

Richard Barrett, an individual.

Respondents

University of Mississippi; Robert Khayat, Chancellor of the University of Mississippi; Pete Boone, Former Athletic Director of the University of Mississippi; Tommy Tuberville, Head Football Coach of the University of Mississippi; Don Wood, Policeman of the University of Mississippi; Calvin Sellers, Policeman of the University of Mississippi; Andy Mullins, Member of the Chancellor's Cabinet of the University of Mississippi; Don Fruge, Member of the Chancellor's Cabinet of the University of Mississippi; Carolyn Staton, Member of the Chancellor's Cabinet of the University of Mississippi; Dick Mullendore, Member of the Chancellor's Cabinet of the University of Mississippi; Gloria Kellum, Member of the Chancellor's Cabinet of the University of Mississippi; Gerald Walton, Member of the Chancellor's Cabinet of the University of Mississippi; Maurice Efink, Member of the Chancellor's Cabinet of the University of Mississippi; Rex Deloach, Member of the Chancellor's Cabinet of the University of Mississippi; Thomas Wallace, Member of the Chancellor's Cabinet of the University of Mississippi; Ed Meek, Member of the Chancellor's Cabinet of the University of Mississippi.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Barrett, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Fifth Circuit from which certiorari is sought is contained in the case styled *Richard Barrett v. University of Mississippi, et al,*[1] at Appendix A, dated August 18, 2000, which affirmed the District Court's summary-judgment holding that there was no expressive conduct involved in a protest featuring display of a Confederate flag. The final judgment dated August 18, 2000 is at Appendix B, with mandate dated September 11, 2000. The decision of the United States District Court for the Northern District of Mississippi, Western Division, in the case styled *Richard Barrett*[2] *v. Robert C. Khayat, et al*, Civ. Action No. 3:97CV211-B-A, at Appendix C, dated November 12, 1999, was affirmed. The final judgment is at Appendix D, dated November 12, 1999.

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[1] Designated by the Court, below, as unreported.

[2] The Plaintiff was Richard Barrett. Some orders issued by the District Court, in error, inserted a middle initial "N."

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1) and 2106.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1, Petitioner, Richard Barrett, is an individual, not a corporation.

CONSTITUTIONAL PROVISIONS

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STICK BAN OF OCTOBER 22, 1997

Consistent with the existing policy of banning umbrellas for safety reasons effective November 1, 1997, spectators will not be permitted to bring sticks or other pointed objects to University of Mississippi athletic events.

FLAG BAN OF NOVEMBER 6, 1997

- No containers or alcoholic beverages
- No umbrellas
- No flags larger than 12 x 14
- All personal items subject to search.

STATEMENT OF THE CASE

Petitioner Richard Barrett desired to display a Confederate flag at the University of Mississippi as a form of protest against racial integration and regulations by school administrators purporting to ban the flag. Social protest, including the waving of flags, had been conducted in the

University's football stadium for some thirty-five years, but various pressure groups had been, at the time, attempting to ban the practice on the grounds that it was "offensive" to Negroes and adversely impacted the recruiting of Negro football players.

In response to demands by minorities and other groups, a ban on 3'x5' flags was enacted by Administrators, but not enforced. A ban on flag sticks, also, was enacted, to curtail use of small, popular, hand-held flags, but not enforced. Administrators pleaded with flag-wavers to surrender their flags, which served to increase the protests.

When Administrators announced that they would "enforce" the bans, Petitioner displayed[3] a 3'x5' flag, accompanied by words of protest, at the rear of the stadium, against a back fence. According to the verified Amended Complaint, Petitioner stated to those about him "that he was displaying a Confederate flag to protest the Stick Ban, James Meredith being forced into the University and [Football Coach Tommy] Tuberville for attempting to ban said flag from display in the stadium." Various onlookers gave the "thumbs up" sign of support and there were no disruptions. However, police compelled Petitioner to discontinue his protest, on the grounds that it was "offensive" to "certain" minority groups.

Petitioner was offered an "alternate" place to protest in a vacant, dark and empty park across campus, which Peti-

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[3] The flag was held, rather than waved, but will be referred to generally as flag-waving, throughout.

tioner rejected as inadequate. Petitioner then applied for "permission" to conduct the protest the following week in the same manner, in the same place, which Administrators rejected.

Petitioner's cause was set forth in a verified Amended Complaint, affidavits and a compilation of newspaper clippings and Internet postings to indicate the setting and circumstances of the protest. The affidavits also expounded upon the words spoken during the protest. The District Court excluded the affidavits and clippings as violations of the *Federal Rules of Evidence*, refused to allow Petitioner to conduct any discovery and held that no reasonable person could interpret the flag-waving as expressive conduct. The Court, in ignoring the context and setting, reasoned that the flag was a "chameleon" which could stand for many things. It, also, declined to consider the words of protest spoken in accompanying the protest, as set forth in the verified Amended Complaint. Holding that the "game management" restrictions were reasonable limitations, the District Court granted summary judgment.

Administrators had submitted their affidavit that an unnamed, unidentified person, a decade before, had complained of being injured by a flag stick and insisted that they had acted, a decade later, out of "safety" concerns and to prevent "obstruction" of spectators' view at ball games. However, there had been no action to ban the flags or sticks until the most recent agitation by minority groups to do so. There was no record, evidence or finding that any substantial injuries had resulted from the traditional flag-waving or that there had been any substantial disruption of

school activities attributed to the long-standing protests.

The appellate court affirmed on the grounds that excluding Petitioner's affidavits and denial of discovery was not an abuse of discretion, that Petitioner's conduct was not "expressive" and that Respondents' conduct and policies were reasonable for "game management."

The case is timely brought here to bring this decision, involving important constitutional rights, in line with relevant decisions of this Court.

REASONS FOR GRANTING THE PETITION

There have been significant rulings delineating the expressive rights of students and teachers in the school environment. But what about those not teachers or students, who also may wish to engage in expressive activities while legitimately on school premises? Does *Tinker* and its progeny apply to parents or others, by implication or analogy? Or, would such persons fall into some other, special or more limited category?

This case gives the Court the opportunity, for the first time, to define and, perhaps, deepen and widen the expressive rights of the those – not pupils or faculty – on school premises.

It, also, allows the Court to clear the muddy waters at the confluence of those two great rivers: "Expression" and

"Decorum," at a critical time, impacting all of the nation.

Certainly, circumstances may come into play in examining challenged regulations, on a case-by-case basis. Whether a forum or venue may have been "opened up" for discussion previously – and to what extent, if any – could be a factor. How officials conducted themselves and interpreted their regulations could, also, be relevant, as well as the reasons for any restrictions.

But a recognition that visitors lecturing in an auditorium, fans assembling at a playing field or, even, parents meeting in a cafeteria all have a significant and protected role – given proper decorum – as part of our "profound national commitment" in the "debate on public issues [which] should be uninhibited, robust and wide-open" would seem to be an important step for the Court and a welcome advance for American freedom.[4]

PROPOSITION I

THOSE ENGAGING IN EXPRESSIVE ACTIVITIES DURING SCHOOL ACTIVITIES ARE ENTITLED TO THE SAME FIRST AMENDMENT PROTECTIONS AS STUDENTS AND TEACHERS.

This case begins with display of a flag for what might be called "pure speech" or "symbolic speech" at a school,

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[4] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

see Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); (for the rationale). It is well-settled that neither students nor teachers[5] "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506. "A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field ... he may express his opinions, even on controversial subjects," *Tinker*, 393 U.S. at 512. And, even if argument or disturbance might result, *Terminiello v. Chicago*, 337 U.S. 1 (1949), the school remains a "marketplace of ideas," *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

Here, for the first time, the issue concerns not only the "playing field" of *Tinker*, but an attendee at a football game, not a student, teacher or parent.

Alternatively, school facilities may be deemed to be public forums if school authorities have, by policy and practice, opened the facilities for indiscriminate use by either the public or some segment of the public, *Hazlewood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988), as appears to be the case, here, *see e.g.* Appendix "E" and "J". This would generally be known as having created a "designated" public forum, *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46-47, n. 7

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[5] *Tinker* cites authority undergirding the constitutional rights of teachers, students and parents, but focuses primarily upon students.

(1983).[6]

Protests on the subject of racial integration and other grievances,[7] involving the waving of Confederate flags, have been a fixture in the school's stadium for some thirty-five years, since the forced entry of James Meredith in 1962 and the vitriolic opposition of Governor Ross Barnett, see Appendix "K," ¶13-4.

The school, itself, encouraged and practiced and, even, distributed flags to protesters, over the years, *see* Appendix "F" and "H," 27.

Petitioner was a fan or spectator, legitimately upon school premises for school activities, while conducting expressive activities. So, are "spectators" to be treated differently than students or teachers? Are the football stands different from the playing field?

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[6] A designated public forum is not created, however, if there is only "limited" discourse conducted, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). But it appears that there was no such limitation, in the case at hand. Respondents endeavored to exclude certain "outside" groups from using the facilities, somewhat recently, but not, until most recently, to limit discourse.

[7] Such as protests against school policies, pronouncements by school officials and most recent attempts to ban flag-waving, itself.

Some decisions have distinguished "students" from "adults," *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), in analyzing expressive activities in a school environment, suggesting that "age and maturity" might be somewhat differently situated than "youth and immaturity," although there seems to be no compelling governmental interest, under the facts at hand, for such distinction.

The overarching consideration is that the expressive conduct not be inconsistent with the school's "basic educational mission," *Bethel*, 478 U.S. at 685.

So, if the football game happened to take place on the Fourth-of-July, could a student in the stands wave an American flag? What about a Confederate flag on Robert E. Lee's birthday? Or a Serbian flag on the day of the downfall of the Milosevic regime?

If a student could, could an adult do so, as well?

Arguably, a pin, badge, jacket or armband with American, Confederate or Serbian colors could be worn. At least, until some "game manager" would find them, also, to be "offensive."

What if some event were taking place in conjunction with the flag display, which formed the nexus of a protest? Some military action which raised ire? Some assault upon institutions which caused controversy? Or, some dispute abroad which raised consciousness?

The circumstances of a protest are crucial to the Court's deliberations. *Texas v. Johnson*, 491 U.S. 397 (1989) (for the rule). In the instant case, there was not only the long history of flag-waving as protest in the football stadium, but there had been significant discussion and controversy – including polls, pronouncements, demands, news releases, speeches, editorials and publications – over the flag leading up to the instant protest, *see, e.g.* Appendix "E," "H" and "J."

Flag-wavers had been threatened by the school, for the first time, with arrest, over restrictions which, although in place, had been routinely ignored, *see* Appendix "I." Consequently, the instant protest was sparked against the ban, itself, as well as the continued voicing of long-standing grievances against racial integration, *see* Appendix "K."

Petitioner's conduct may be likened to that of Street in *Street v. New York*, 394 U.S. 576 (1969). While using a flag as a protest, Street uttered various words of protest to others in support of James Meredith. The decision turned on the use of words, holding that the protester could not be punished for speech.

However, in a later ruling, a flag protester who did not utter speech, but who, nonetheless, used a flag, was protected. *See Johnson,* 491 U.S. at 404 (conduct imbued with elements of communication falls within scope of the First and Fourteenth Amendments).

While the District Court concluded, in error, that no one could possibly understand the message sought to be

conveyed by the protest at hand, *see* Appendix "C," 16, just the opposite seems to be the case. Display of the flag at the very time officials were trying to ban it and minorities were making demands against it was clearly a challenge to the ban, itself, as well as to the minorities and their policies. The unfurling of the flag at the very time that minorities were clamoring for the flag to be banned seems no different from the protester's displaying a "peace" sign coinciding with the Cambodian invasion, *see Spence v. Washington*, 418 U.S. 405, 410 (1974). Or of Johnson's burning a flag following a demonstration at the Republican National Convention.

The fact that the American flag might also be a symbol of distress if held upside down, under certain circumstances, would not have detracted from Johnson's conduct as being expressive. Neither would the fact that the Confederate flag might, also, be used, on occasion, for a showing of "school spirit" change the nature of the instant protest, message and expressiveness.

Notwithstanding, Petitioner also uttered words of protest against the flag-ban and racial integration as part of his protest to those around him, many of whom expressed approval with the "thumbs up" sign, *see* Appendix "G."

This was clearly expressive conduct, purposely inviting dispute, as distinguished from the student drawing a Confederate flag in class who was said to have acted in an "innocent" and "nonthreatening" manner. *Compare West v. Derby Unified School District No. 260,* 206 F.3d 1358 (10th Cir.2000), *cert. den.* ___ U.S. ___ (2000) ("inno-

cent") *with Terminiello*, 337 U.S. at 4, "a function of free speech ... is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are" ("inviting dispute").

Having invoked the protections of the First and Fourteenth Amendments, Petitioner mounted a facial[8] assault on the regulations under which his protest was terminated and he was threatened with arrest.

It was alleged that the entire procedure vested too much discretion in administrators to pass constitutional muster, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) and unwarrantedly placed a prior restraint upon discussion of public issues, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). The context of officials' expressed desire to prevent speech which would, in their estimation, put a damper on recruitment of Negro football players, *see e.g.* Appendix "F," "H" and "J," was faulted as content-based discrimination, *see e.g. Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123, 135 (1992) (content neutrality rule).[9]

The regulations were faulted under void-for-vagueness and overbreath standards, *see e.g. Police Department of*

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[8] "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation," *Forsyth County,* 505 U.S. at 129.

[9] A rule with which Petitioner personally disagrees.

Chicago v. Moseley, 408 U.S. 92 (1972) and *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-799 (1984). Respondents' conduct and on-again-off-again construction, *see e.g.* Appendix "I," was scored as arbitrary, *Forsyth County*, 505 U.S. at 131, as was the promulgation of the regulation which prohibited 12x14 flags, without any designation of inches, feet or standard, *see* Appendix "G," but enforced and interpreted the regulation as meaning inches.[10] *Cf. Smith v. Goguen*, 415 U.S. 566 (1974) (for the potentiality for abuse when a measure has the *potential* to be administered in an arbitrary manner);[11] *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("precision of regulation" required for constitutionally protected activity).

Equal protection was said to have been offended by Respondents' "picking and choosing" which groups could display flags and under which conditions.

In *Forsyth County*, the one administering the challenged regulation *necessarily* had to take into account the content of proposed speech in order to determine security

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[10] See Order, Appendix "C," 10, for the regulations.

[11] The *Goguen* Court noted that a protester could be charged for wearing a flag on his pants, whereas a veteran seeking shelter beneath a flag would likely not be. Likewise, here, one carrying a flag for a comforter on his lap might not be charged, no matter what the flag's size, unless he raised the banner up where people could see it.

measures,[12] despite his protestations that he did not consider such content. Here, Petitioner was told specifically by police that the regulation was in force because "certain" minority groups objected to display of the flag, *see* Appendix "K," 36.

There are no carefully tailored guidelines to guide Respondents' discretion. The campus policemen, Sellers and Woods, alone, hold the keys – or the padlock – to the portals of free speech. This is too much discretion to pass constitutional muster. *See e.g. Forsyth County*, 505 U.S. at 129 (too much discretion, with no objective guidance, violates the First Amendment).

Alternatively, even under a *United States v. O'Brien*, 391 U.S. 367 (1968) analysis, the regulations were faulted as unreasonable, unnecessary and unduly oppressive.[13]

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[12] *Forsyth County*, 505 U.S. at 134 (for the "necessity" rationale).

[13] Should it appear that Petitioner did not materially or substantially disrupt the school's activities or depart significantly from the school's educational mission or if, alternatively, the playing field is seen as a designated public forum, then analysis under First Amendment to foster "the widest possible dissemination of information from diverse and antagonistic sources," then the "facial invalidation" analysis akin to *Associated Press v. United States*, 326 U.S. 1, 20 (1945) comes into play rather than the "reasonable time, place and manner" analysis of *O'Brien*.

PROPOSITION II

EXPRESSIVE CONDUCT AT A SCHOOL, WHICH DOES NOT CAUSE ANY SUBSTANTIAL DISRUPTION, UNDER CIRCUMSTANCES IN WHICH ADMINISTRATORS SEEK TO BAN SUCH SPEECH BECAUSE OF ITS CONTENT, SHOULD BE PERMITTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The unique educational environment is subject to four qualifications. The expression may not:

- Materially and substantially interfere with operation of the school, *Tinker*, 393 U.S. at 513;
- Be reasonably anticipated to be disruptive, *Tinker*, 393 U.S. at 509;
- Unduly impinge on the rights of others, *Tinker*, 393 U.S. at 513; and,
- Be lewd or obscene, *Bethel,* 478 U.S. at 682.

It appears that Administrators, notwithstanding their own pronouncements, *see* Appendix "J," were concerned with preventing discussion or controversy over an issue upon which they had a decided opinion of their own.[14] *See*

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[14] Athletic Director Boone, for example, has been reported as stating that the reason for the restrictions was to prevent people from arguing in the stands, *see* Appendix

e.g. Forsyth County, 505 U.S. at 131 (administrator's constructions, implementation and interpretation of rules to be considered by the Court).

The record is bare of any indication that such protests have caused any material or substantial disruptions in school activities, however, at any time. The football game was not impeded. The spectators were not thrown into turmoil. No violence was reported. Neither was their any serious disturbing of anyone's view by display of a flag, against a back wall of the stadium, *see e.g.* Appendix "K."

PROPOSITION III

UTTERANCES, CIRCUMSTANCES, EQUAL PROTECTION, OVERBREADTH, VAGUENESS AND OTHER POINTS WERE DULY RAISED BELOW TO CHALLENGE "GAME MANAGEMENT" REGULATIONS AND THEY ARE NOW PROPERLY BEFORE THE COURT EITHER BY WAY OF APPEAL, AS PART OF A FACIAL CHALLENGE OR *DE NOVO.*

It is well-settled that this Court conducts its own, independent review of First Amendment cases, s*ee e.g. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of*

"I" and "K," 35-36. Football Coach Tuberville had reportedly stated that the ban would help him recruit Negro football players, *see* Appendix "H." Petitioner's request to conduct discovery of these Respondents was turned down by the District Court, *see, e.g.* Appendix "A," 4.

Boston, 515 U.S. 557 (1995) (appellate *de novo* consideration is without deference to the trial court).

Deciding the case, below, on summary judgment, on the holding that there was no expressive conduct and no uttering of words, *see e.g.* Appendix "A," 4, and "C," 16, is clearly erroneous. Words explaining the demonstration as a protest against the Stick Ban and integration were clearly stated to police and those in the vicinity, evoking cheers and "thumbs up" gestures of support, *see e.g.* Appendix "G" and "K." The conclusion that the expressive conduct could not reasonably be understood by those witnessing it is patently wrong.

The utterances – as well as circumstances surrounding the protest – were stated in the verified Amended Complaint and, as such, should have withstood a motion for summary judgment. There were, also, affidavits, newspaper clippings and exhibits which bolstered the allegations of the Amended Complaint.

Although the District Court thought otherwise, newspaper clippings and other statements should be admissible to show relevant history and setting, rather than for purposes of whether of not the material therein was true or false. This Court employed such a technique in *Forsyth County*, for example (history of events leading to protests gleaned from newspaper accounts).[15] *See also* Rules 401 (as to

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[15] The District Court, in the instant case, even resorted, of its own volition, to a newspaper account of an opinion by a professor of what the Confederate flag supposedly,

relevance), 803(20), (24) (as to history), 902(6) (as to self-authentication) *Federal Rules of Evidence.*

In is, in the alternative, likely that the flag protest may be regarded as sufficiently expressive, given the circumstances of the history – both long-standing and recent – of the use of the flag for protest in the football stadium.

Compare, for instance, *Johnson*, where the protester did not speak but burned a flag while others chanted, with the instant case, where the protester who did speak displayed a flag while others cheered.

Here, however, the error or defect, below, in overlooking assertions in the pleadings, is seemingly cured by this Court's consideration of this First Amendment challenge *de novo*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (for the procedure).

Even though the District Court declined to consider affidavits and exhibits, as well as refused to allow discovery,[16] it should have considered the verified pleadings

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theoretically "means," while excluding clippings offered by Petitioner for the same purpose, *see* Appendix "C," 15, n. 6.

[16] Which was also ascribed as error, below and, now, here, alternatively, as the case may be. *Cf. Bauer v. Albermarle Corp.*, 169 F.3d 962, 968 (5th Cir.1999) (discovery should be allowed if need "adequately demonstrated to the court").

which set forth history and setting, as well as words accompanying the flag-waving, to overcome the allegation that there was no expressive conduct and, hence, no "genuine issue of material fact." *Kaehni v. Diffraction Co.*, 342 F.Supp. 523, *aff'd* 473 F.2d 908 (4th Cir.1973), *cert. den.* 414 U.S. 854 (1973), *reh. den.* 414 U.S. 1033 (1973) (minimal pleadings are sufficient to raise genuine issue as to any material fact).

The holding, below, that there was no expressive conduct is clearly in error, given the assertions in the Amended Complaint, Appendix "K," 1, ¶13-1 (as to words spoken):

> [A]t the Ole Miss - Arkansas football game, Plaintiff stated ... to others thereabouts, that he was displaying a Confederate flag to protest the Stick Ban, James Meredith being forced into the University and Defendant Tuberville for attempting to ban said flag from display in the stadium.

See also Appendix "K", 1-2, ¶¶13-4-6 (as to setting).

This Court, certainly, prefers – and should have – a full record, which affidavits, discovery and testimony at a trial would have supplied. Notably, four dissenters in *Forsyth County* expressed a desire to remand that important First-Amendment case for further proceedings, even after a trial and testimony of witnesses.

However, it would seem that by the Court's considering

the entire record,[17] sufficient grounds will have been shown to invalidate the offending stick and flag bans. Or, the case could be remanded for further development of the record, if need be.

CONCLUSION

Defining or clarifying the expressive rights of non-students and non-teachers in the school environment will not mean that Confederate-flag waving will proliferate any more than flag-burning was stepped up following *Johnson*.

But in an important area of expression neglected or overlooked for some time, the impact could be significant.

A parent at a Parent-Teachers' Association meeting in the cafeteria might bring a flag to dramatize a point, just as a fan could wave a flag at the playing field to press his view or a visiting lecturer could unfold a flag during a symposium in the auditorium to illustrate his thesis. The attention of a student might be caught to ponder or write about the matter. Debate might ensue. And, the educational mission of the school might even be advanced.

Nothing in striking down or remanding the nebulous Flag Ban or the jaded Stick Ban allows someone to engage

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[17] It is said that the preferable method is for the Court, if need be, to consider affidavits and exhibits and to exclude anything therein which is inadmissible, rather than to disregard the materials, altogether, *cf. Martin v. John W. Hone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir.-1987).

in breaches of the peace.

Flag-waving may be as shocking as someone entering a stadium wearing a gaudy outfit. Or, an undercover policeman delivering a DARE lecture in the cafeteria wearing a gangster's lurid colors. Both may seek to make a point or, what *Goguen* called, "a ploy to attract attention." Even to startle. Maybe even to annoy.

But, where the practice does not materially disrupt the school environment, flag-waving is – or should be – as a nexus of expression – protected.

If the Court were to retreat from modern constitutional jurisprudence and permit unbridled discretion to creep back into the marketplace of ideas, so that those conducting "game management" may consider – actually or necessarily – the content of flag-wavers' speech, the profound national commitment to wide open and robust discussion of public affairs would suffer an enormous setback.

If the playing field were to be set apart for exceptional, unreasonable and unnecessary restrictions on expression, then tomorrow the cafeteria could be impacted, then the auditorium and, then, the classroom, itself.

Will a football stadium, then, take on the appearance of a political convention? Perhaps in some ways it already has. For, after all, what has gone better with cheering the all-American pastime than expressing all-American freedoms?

It is neither parochial nor regional, but rather universal and ennobling, to affirm that a flag is a poor man's megaphone, a pauper's pulpit, a Lincolnesque stump, a protester's pom-pom.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RICHARD BARRETT
Pro Se

Richard Barrett
PO Box 2050
Learned MS 39154
(601) 885-2288

Petitioner

Appendix 1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60886
Summary Calendar

RICHARD BARRETT

Plaintiff - Appellant

versus

UNIVERSITY OF MISSISSIPPI; ET AL

Defendants

UNIVERSITY OF MISSISSIPPI; ROBERT KHAYAT, Chancellor of the University of Mississippi; PETE BOONE, Former Athletic Director of the University of Mississippi; TOMMY TUBERVILLE, Head Football Coach of the University of Mississippi; DON WOOD, Policeman of the University of Mississippi; CALVIN SELLERS, Policeman of the University of Mississippi; ANDY MULLINS, Member of the Chancellor's Cabinet of the University of Mississippi; DON FRUGE, Member of the Chancellor's Cabinet of the University of Mississippi;

Appendix 2

CAROLYN STATON, Member of the Chancellor's Cabinet of the University of Mississippi; DICK MULLENDORE, Member of the Chancellor's Cabinet of the University of Mississippi; GLORIA KELLUM, Member of the Chancellor's Cabinet of the University of Mississippi; GERALD WALTON, Member of the Chancellor's Cabinet of the University of Mississippi; MAURICE EFINK, Member of the Chancellor's Cabinet of the University of Mississippi; REX DELOACH, Member of the Chancellor's Cabinet of the University of Mississippi; THOMAS WALLACE, Member of the Chancellor's Cabinet of the University of Mississippi; ED MEEK, member of the Chancellor's Cabinet of the University of Mississippi

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Mississippi
USDC No. 3:97-CV-211-B-A

August 18, 2000

Before JOLLY, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Richard Barrett appeals the summary judgment dismissal of his complaint brought pursuant to 42 U.S.C. § 1981. In his complaint, Barrett challenged the constitutionality of the University defendants' game management policies, which prohibited spectators from carrying sticks and large flags or banners into the University's football stadium during athletic contests.

Barrett first avers in a conclusional fashion that the district court erred in striking the affidavits and other documents offered in support of his opposition to the motion for summary judgment. There was no error. See Fed. R. Civ. P. 56 (e); Gieserman v. MacDonald, 893 F.2d 787, 792-93 (5th Cir. 1990).

Barrett contends further that the district court erred in granting summary judgment in favor of the University defendants. We have reviewed the briefs and the record and hold that the district court did not err in granting summary judgment for the University defendants. As the record stands, there was no genuine issue as to any material fact, and the University defendants were entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The district court did not err in finding that Barrett's flag waving was not expressive conduct and that

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* Pursuant to 5TH CIR. R. 47. 5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the game management policies were constitutional.

Finally, Barrett avers that the district court erred in staying discovery. This court reviews a district court's discovery orders for abuse of discretion. McKethan v. Texas Farm Bureau, 996 F.2d 7341 738 (5th Cir. 1993). Because the University defendants raised qualified immunity as a defense, the district court could not allow discovery to proceed until this question was resolved. Siegert v. Gilley, 500 U.S. 226, 232 (1991). Thus, the district court's decision to stay discovery was not an abuse of discretion.

AFFIRMED.

Appendix 5

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60886
Summary Calendar

D.C. Docket No. 3:97-CV-211-B-A

RICHARD BARRETT

Plaintiff - Appellant

v.

UNIVERSITY OF MISSISSIPPI; ET AL

Defendants

UNIVERSITY OF MISSISSIPPI; ROBERT KHAYAT, Chancellor of the University of Mississippi; PETE BOONE, Former Athletic Director of the University of Mississippi; TOMMY TUBERVILLE, Head Football Coach of the University of Mississippi; DON WOOD, Policeman of the University of Mississippi; CALVIN SELLERS, Policeman of the University of Mississippi; ANDY MULLINS, Member of the Chancellor's

Cabinet of the University of Mississippi; DON FRUGE, Member of the Chancellor's Cabinet of the University of Mississippi; CAROLYN STATON, Member of the Chancellor's Cabinet of the University of Mississippi; DICK MULLENDORE, Member of the Chancellor's Cabinet of the University of Mississippi; GLORIA KELLUM, Member of the Chancellor's Cabinet of the University of Mississippi; GERALD WALTON, Member of the Chancellor's Cabinet of the University of Mississippi; MAURICE EFINK, Member of the Chancellor's Cabinet of the University of Mississippi; REX DELOACH, Member of the Chancellor's Cabinet of the University of Mississippi; THOMAS WALLACE, Member of the Chancellor's Cabinet of the University of Mississippi; ED MEEK, member of the Chancellor's Cabinet of the University of Mississippi

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Mississippi, Oxford.

August 18, 2000

Before JOLLY, WIENER, and PARKER, Circuit Judges.

Appendix 7

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Sep. 11, 2000.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RICHARD N. BARRETT,

PLAINTIFF

V.

ROBERT C. KHAYAT, ET AL,

DEFENDANTS

CIVIL ACTION NO. 3:97CV211-B-A

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion to strike and their motion for summary judgment.[1]

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[1] Defendants' "motion to strike affidavits and collective exhibit in support of Barrett's reply in opposition to defendants' motion for summary judgment, or in the alternative, to dismiss claims for money damages and attorney's fees" is herein referred to as "motion to strike" and Defendants' "motion fir summary judgment, or in the alternative, to dismiss claims for money damages and attor-

Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

Vaught-Hemingway Stadium is the University of Mississippi football arena located on the campus of the University of Mississippi ("University") in Oxford, Mississippi. The stadium seats more than 50,000 people and is used for University football games as well as band related activities. Since 1990 the governing board of the University, the Board of Trustees of State Institutions of Higher Learning, has prohibited use of the stadium by any organization outside of the University.

In the early 1990's, the University adopted a policy prohibiting spectators from bringing large banners or flags into the stadium in order to avoid obstruction of spectators' view. This policy was posted on a sign outside the stadium which read, "Flags and Banners larger than this sign will not be allowed in the stadium." The original size restriction limited flags and banners to 12 by 18 inches, the size of the sign posted. In subsequent years the size restriction was changed to 12 by 14 inches.

The University officials have stated that because they feared possible injuries caused by flag sticks and had received complaints from spectators that flags obstructed their view, on October 22, 1997, the University Adminis-

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ney's fees" is herein referred to as "motion for summary judgment."

trative Cabinet, consisting of University faculty and administrators who advise the Chancellor on policy issues, discussed and implemented a flag stick ban ("stick ban").[2] The stick ban states as follows:

> Consistent with the existing policy of banning umbrellas for safety reasons effective November 1, 1997, spectators will not be permitted to bring sticks or other pointed objects to University of Mississippi athletic events.

The stick ban was first enforced at the University football game on November 6, 1997. The signs posted outside the stadium in November 1997 read:

- No containers or alcoholic beverages
- No umbrellas
- No flags larger than 12 x 14
- All personal items subject to search.

There is no written policy regarding flag size restrictions other than upon the posted signs.

The plaintiff attended the November 6, 1997 football game with two companions. The plaintiff and his companions attempted to display a 3' x 5' confederate battle flag, or "rebel flag," inside the stadium. The three were required by officers of the university police department to

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[2] Unless specifically designated, this opinion will collectively refer to the stick ban and the flag size restriction as "the bans."

discontinue displaying their flag.

Thereafter, the plaintiff, aggrieved of the decision to implement the bans, requested the University's permission to display the 3x5' flag at the next home football game on November 22, 1997. The University refused.

The plaintiff then filed this action against "The University of Mississippi and Board for the Institutions of Higher Learning." The plaintiff amended the complaint to add as defendants numerous individuals, including Chancellor Robert C. Khayat, members of the college board, and individuals who are, or were, employees of the University. By order of the court dated January 9, 1999, all of the plaintiff's claims against the defendant members of the college board were dismissed. As the order stated, the "decision to create and enforce a stick ban at University athletic events is one of the many decisions regarding day-to-day management of the University made by Chancellor Khayat which are never brought before the College Board for approval."[3] The charges against the University defendants in their official capacities and for monetary damages were dismissed with prejudice; the reasons for the said dismissal are stated in the order. The plaintiffs remaining claims are against the University defendants in their individual capacities.[4]

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[3] *See* Barrett v. Khayat, et al, Memorandum Opinion, p. 4 (January 9, 1999).

[4] The University defendants, Robert C. Khayat, James T. "Pete" Boone, Thomas H. Tuberville, Donald W.

A. DEFENDANTS' MOTION TO STRIKE

The defendants have moved to strike the affidavits of Hershel Welborn, W. O. "Chet" Dillard, Joe McNamee, and Richard N. Barrett and a collective exhibit of more than a hundred pages of articles and other information.[5] The defendants have cited the Federal Rules of Evidence, specifically Rules 402, 602, 701, 802 and 901, as a basis for the inadmissibility of the affidavits and the collective exhibit. Although affiant W. 0. Dillard is known by the court to be knowledgeable in the area his affidavit covers, nevertheless, the affidavit mainly consists of conclusions which would be inadmissible from a lay witness and Judge Dillard has not been tendered by the plaintiff as an expert under Rule 702 of the Federal Rules of Evidence. Upon due consideration of the parties' memoranda and the exhibits in question, the court finds that the defendants' motion to strike the said affidavits and the collective exhibit is well taken and should be granted.

Wood, B. Calvin Sellers, Jr., Andrew P. Mullins, Jr., Don Fruge, Carolyn Ellis Staton, Richard H. Mullendore, Gloria D. Kellum, Gerald W. Walton, Maurice R. Eftink, Rex Deloach, Thomas D. Wallace, Jr., and Edwin E. Meek, are herein collectively referred to as "defendants."

[5] The affidavits are attached to the plaintiff's reply as exhibits A, B, C and D, respectively. The collective exhibit is designated as "Exhibit A." This opinion will refer to them as "the affidavits" and "the collective exhibit."

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U. S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing' ... that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U. S. at 3 24, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, 477 U.S. 242, 255, 91 L.Ed.2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to a party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L.Ed. at 273. Before finding that no genuine issue of material fact exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Cor. 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The University contends that the bans do not prohibit speech, but rather prohibit spectators from bringing certain items into the stadium. This argument, if persuasive,

would permit the bans to escape First Amendment scrutiny. Such an argument is not persuasive. The University also takes the position that even if the bans do impact expressive conduct and speech, they still survive under a First Amendment analysis.

From considering a brief history of the meaning of the confederate flag and the various messages it is intended to convey by various groups who display it, the court finds it unlikely that the message the plaintiff in this case intended to convey by exhibiting the flag would be understood by those who see it. There is also a question raised as to whether the University is banning flags larger than 12 by 14 inches to prevent the waving of the confederate or "rebel" flag at football games for safety and sight reasons, or because the University feels these flags convey an inaccurate and inappropriate message which impacts the image of the University adversely. In order to determine whether activities constitute "expressive conduct and fall within the First Amendment, they must be sufficiently imbued with elements of communication." Jones v. Collins, 132 F,3d 1048, 1054 (5th Cir. 1998), reh'g denied, 137 F. 3d 1353 (5th Cir. 1998) (quoting Cabrol v. Town of Youngsville, 106 F.3d 101, 109 (5th Cir.1997)). For a court to determine "whether particular conduct possesses communicative elements to bring the First Amendment into play, [the court must] ask whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it." Jones, 132 F.3d at 1055. Further, it is necessary that the court look at the conduct or action taken and the context and environment in which it was taken.

Cabrol, 106 F. 3d at 109.

The confederate flag is a chameleon. It changes meaning depending on where it is displayed and by whom. Dr. David Sansing, a scholar and lecturer on the subject of the confederate flag, points out[6] that for some it has to do with racial superiority, as when it is displayed by the Ku Klux Klan or other racially motivated groups; yet others insist that when waved at football games, the confederate flag is meant to convey a message of school spirit and courage; still others, like the State of South Carolina which flies the confederate flag atop its statehouse, insist that the confederate flag symbolizes loyalty and respect for the history of the state and those who have fought on its behalf, and not a statement or meaning which should be racially provocative. There are still others who insist that regardless of the message the bearer of the flag intends to convey, it is perceived by many as racially offensive and a past symbol of a fight over whether slavery should exist.[7] Thus, the statement made by the flag can range from endorsing demeaning and offensive racial philosophies to promoting school spirit. As beauty is in the eye of the beholder, so is the message of the flag often mainly in the perception of the observer.

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[6] *See* article by Dr. David Sansing, Professor Emeritus of History, University of Mississippi, *Rebel Flag Continues to Provoke Misunderstanding in Mississippi Today*, THE CLARION-LEDGER, Nov. 19, 1989, at H5.

[7] *Id.*

Concluding that the display of the confederate flag is in fact a statement of speech or expressive conduct and even considering arguendo, as the plaintiff claims, that the true reason the University banned flags larger than 12 by 14 inches is for the purpose of protecting the image of the University, can the University, nevertheless, ban all flags larger than 12 by 14 inches from the football stadium on the grounds of safety and enjoyment of the game by others. Upon review of the facts and law relevant to this case, the court concludes that the bans as implemented by the University are within the authority of the University and do not constitute deprivations of the plaintiff's First Amendment rights.

The plaintiff appears to argue that the confederate flag is a symbol and that as a symbol it must inherently be saying something, or communicating a message protected by the First Amendment. It is from this premise he contends that his display of the confederate flag is a form of symbolic speech by which he is protesting against "the Stick Ban, James Meredith being forced into the University and Defendant Tuberville for attempting to ban said flag from display in the stadium."[8] The court finds it inconceivable that this stated message intended to be conveyed by the plaintiff's display of a large flag would be interpreted as plaintiff intends by those observing the display - but rather it could, and more likely would, be construed as sending

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[8] *See* plaintiff's Amended Complaint at 16.

many messages.[9] An individual as an observer of the plaintiff's flag display would not understand the plaintiff's intended message about Tommy Tuberville and James Meredith. With no likelihood that observers would comprehend the plaintiff's intended message, the court finds the plaintiffs conduct, therefore, cannot be construed as expressive conduct to be protected by the First Amendment.

The Supreme Court has recognized that not every type of conduct which is intended to express an idea may be characterized as "speech." United States v. O'Brien, 20 L. Ed. 2d 672, 679, 391 U.S. 367, 88 S.Ct. 1673 (1968); *see also* City of Dallas v. Staglin, 104 L.Ed.2d 18, 490 U.S. 19, 25, 109 S.Ct.2d 1591, 1595, (1989) (it is certainly "possible to find a kernel of expression in almost every activity a person undertakes... but, such a kernel is not sufficient to bring the activity within the protection of the First Amendment"). However,"[w]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." O'Brien, 20 L. Ed. 2d at 679-680.

It is also well settled that limitations upon actions protected by the First Amendment are not absolutely prohibited. *See* Clark v. Community for Creative NonViolence, 82 L. Ed. 2d 221, 227, 468 U.S. 288, 104 S. Ct. 3065

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[9] The plaintiff, in his Amended Complaint, lists 12 meanings which the confederate flag represents to various people. See plaintiff's Amended Complaint at 21-22.

(1984) ("Expression, whether oral or written or symbolized by conduct is subject to reasonable time, place and manner restrictions."). Such restrictions may be valid, "provided they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication." Clark, 82 L. Ed. 2d at 227. The plaintiff admits that there were alternative locations for display without violating the bans, i.e., other places on campus, but he declined to do so.[10] The University states that its bans are for the purposes of safety and control of the spectators within the stadium and reflect upon the University's substantial interest in providing game management and control and a safe and pleasant environment for thousands of people. Although the bans limit the manner in which a flag may be displayed within the stadium, the court finds that this limitation upon the plaintiff's intended demonstration does not eliminate his ability to express his views elsewhere and is a reasonable time, place, and manner regulation.

For the foregoing reasons, the court finds that defendants' motion for summary judgment should be granted.

The defendants have also moved to dismiss the plaintiff's claim for attorneys' fees. In view of the ruling herein on summary judgment, that issue is moot.

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[10] *See* plaintiff's Amended Complaint at 23.

Appendix 19

CONCLUSION

The court finds that the defendants' motion to strike the plaintiff's affidavits and collective exhibit from the plaintiff's response in opposition to the defendants' motion for summary judgment is well taken and that the University's bans are valid. An order will issue accordingly.

THIS, the 12th day of November, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

Appendix 20

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RICHARD N. BARRETT,

PLAINTIFF

V.

ROBERT C. KHAYAT, ET AL,

DEFENDANTS

CIVIL ACTION NO. H-92-3451

ORDER

In accordance with the memorandum opinion this day issued, it is **ORDERED:**

That the defendants' motion to strike is **GRANTED,**

That the defendants' motion for summary judgment is **GRANTED,** and

That this cause is **DISMISSED with prejudice.**

THIS, the 12th day of November, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

APPENDIX E

CLARION-LEDGER[1]
March 20, 1997

University of Mississippi students discuss symbols and their meanings Wednesday at a rally organized by the Students for University Heritage

BATTLE LINES CLEAR AT OLE MISS SYMBOL FORUM

■ More than 100 students participate, argue sides from racism to tradition

By Tony Plohetski
Special to the Clarion-Ledger

OXFORD - Love 'em or hate 'em, the emotions about Ole Miss symbols were evident at a campus forum Wednesday.

More than 100 students participated, some drumming

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[1] Excerpted from the newspaper clipping included in Exhibit "A" to Affidavit of Richard Barrett in Opposition to Motion of Defendants for Summary Judgment. The *Clarion-Ledger* is a daily newspaper of general circulation throughout Mississippi, published in Jackson. This and other clippings were offered not necessarily for their truth or falsity, but to show the setting, history and circumstances of the flag-ban and stick-ban protest.

up support for maintaining traditional University symbols, others stressing the need for change.

"This is a modern-day Klan meeting without burning crosses," said junior Jada Love, calling the symbols offensive to black students. "I am ashamed to say I go here anymore."

Love shouted to the audience: "Do you want minorities here? Then get rid of the symbols."

The symbols – Colonel Reb, *Dixie* and the nickname Ole Miss Rebels – have garnered national media attention since Ole Miss Chancellor Robert Khayat announced he would study whether to change Ole Miss symbols and its traditions as the school looks at its image.

Stokes Duty, a Tupelo native, brought his Rebel flag to the rally. He said he will keep displaying the flag, regardless of any university decision.

"I am disappointed about the turnout," he said. "What we are trying to say is that this flag is here to stay, and that we won't stand for removing the symbols."

Appendix 24

APPENDIX F

AFFIDAVIT OF JOE MCNAMEE[1]
March 22, 1999

21. In the fall of 1997, I became aware of various news reports that Negroes at Ole Miss and elsewhere were campaigning to have the Confederate flag banned, once again. Usually, such demands have gone unheeded. But this time, some of the school officials were giving an ear to the demands.

22. Soon, it was announced that the sticks used to hold flags were banned by the school administration. I protested by traveling to the campus, during a home ballgame....

23. Since attempts were made to put James Meredith into Ole Miss, the Confederate flag has been a banner of defiance. seen on the news, waved by all sorts of people, in all sorts of places, but the centerpiece of it all has been the Ole Miss football stadium at Oxford for as long as I can remember.

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[1] Excerpted from the Affidavit of Joe McNamee in support of the Reply in Opposition to Defendants' Motion for Summary Judgment or to Dismiss.

APPENDIX G

AFFIDAVIT OF RICHARD BARRETT[1]
March 24, 1999

47. I attended the Ole Miss - Arkansas football game with my own 3x5 foot Confederate flag, with no pole, which three of us displayed at the back, top bleachers, against the wall, so as to not obscure anyone's vision. A sign outside the stadium said no flags over 12 x 14 allowed, but there was no "inches," "feet" or other measurement given. As students and fans saw the banner, many cheered and gave thumbs up. I shouted such slogans as: "Stick the Ban," "Bust the Ban," "Free Ole Miss" or "Wave Your Flag" as we stood for about five minutes in the bleachers. Some spectators turned around and smiled or said such things as indicating their approval. There was no disruption, of any kind, or complaints.

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[1] Excerpted from the Affidavit of Richard Barrett in support of the Reply in Opposition to Defendants' Motion for Summary Judgment or to Dismiss.

APPENDIX H

CLARION-LEDGER[1]
September 26, 1997

OLE MISS COACH ASKS FANS TO DROP REBEL FLAG

■ Confederate flag hurts school's image, athletic program, Tuberville says

By Robert Falkoff
Clarion-Ledger Staff Writer

University of Mississippi football coach Tommy Tuberville has taken his fight against the Confederate flag to the student newspaper as the campus prepares for Saturday's homecoming game.

The Daily Mississippian Thursday published a statement from Tuberville reiterating his plea that Confederate flags not be brought to Ole Miss sporting events.

"We are trying to educate our students on what helps us and what hurts us in the stands," Tuberville said. "We are trying to educate them on what helps and what hurts the athletic program."

While the school never endorsed its use, the Confeder-

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[1] Excerpted from the newspaper clipping included in Exhibit "J" to the Amended Complaint.

ate flag was passed out at games for decades. But Tuberville and other coaches have said the flag hurts Ole Miss' image because many people associate the flag with racism.

Tuberville expressed his concerns about the Confederate flag during the summer. He talked with student leaders several weeks ago. But after seeing flags in the stands the first three games, Tuberville took another public stand.

With approximately 2,800 freshmen on campus, Tuberville said education on the subject is important.

"We need to educate new students, who really don't know, who bring a flag simply because somebody gives it to them (before games)," Tuberville said. "They think it is a novelty item. I think a lot of people are not intentionally trying to make Ole Miss look like bad guys, they're just basically being followers."

Tuberville asked students not to accept Confederate flags being distributed around campus before games.

"We're asking the students to support the University of Mississippi's cause, not somebody else's cause," Tuberville said.

Ole Miss sophomore Sonja Grisle said Tuberville's statement will reduce the number of flags.

"People will listen to him and to the athletes," Grisle said.

Ed Lawler, a Jackson attorney and an Ole Miss alumnus, said those who support the university should heed Tuberville.

Lawler said he would tell someone to get rid of a Confederate flag if he sees one at a Rebel football game.

"Yeah, I feel strongly about it," Lawler said. "If you support this school – not just football but academically and every other way – it has to make an impression. Coach Tuberville is on the front line of the recruiting battle. If he says it's a problem, it's a problem."

Bill Hinson of Pearl said he thinks it should be up to each fan whether to bring a Confederate flag. "I feel it's a Constitutional right," said Hinson, an Ole Miss fan.

Anthony Short of Jackson agrees. "It's a symbol of Ole Miss," Short said. "It's part of our Southern heritage."

APPENDIX I

OLE MISS SPIRIT[1]
November 8, 1997

'NOTHING ON A STICK' POLICY WILL BE ENFORCED

Fans who try to bring in sticks will be treated in a professional manner

Athletic Director Pete Boone recently declared a "no-stick" policy at Ole Miss athletic events.

It goes into effect at this Thursday's Ole Miss-Arkansas football game, that will be viewed nationwide on ESPN and is the only football game on TV that night.

"The nation's spotlight will be on us," Boone said. "To me, the Thursday night slot is one of the most beneficial because it's the only game in town, so to speak."

The no-stick policy was issued prior to the Alabama game on campus last Saturday, but it was not enforced.

Boone was pleased that some 99% of Rebel fans voluntarily left their sticks at home, both in support of the athletic department and in support of an earlier resolution by

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[1] Excerpted from the newspaper published regularly in Oxford, Mississippi and distributed on the Ole Miss Campus, attached to the Amended Complaint as Exhibit "K."

the Associated Student Body Senate that stated the "ASB supports the athletic department's stance of not carrying Confederate flags to Ole Miss athletic events."

"There were scattered flags — mostly in the student section, but overall that game had the fewest flags, and sticks, we'd ever seen," said Boone.

...

"We are not going to search people as they enter the stadium, but if there is any visible sign of sticks, our security will give that person an opportunity to leave the stick at the gate or not come in," Boone continued.

There will be security in the stands, too.

"If we see people with sticks in the stands, we will also give that person an opportunity to hand it over or the opportunity to leave," Pete states, "but everything will be handled in a professional and courteous way.

"We don't want any scenes, but we intend to enforce the policy."

...

"We have a lot of forward-thinking, intelligent fans who understand why this is taking place. Even some of the ones who don't fully understand have expressed a desire to comply with our requests," he noted. We have gotten some uncomplimentary letters, but very, very few."

Appendix 31

Boone is hoping for a peaceful situation when the gates open for the Arkansas game, for obvious reasons.

"We don't need Ole Miss people turning on each other or arguing among themselves," he said. "We need to conserve our energy and direct that energy toward the opposition and toward supporting our team."

APPENDIX J

DAILY MISSISSIPPIAN[1]
November 12, 1999

OLE MISS SHOULD OWN UP TO REAL REASONS FOR BANNING FLAGS

Diversity at Ole Miss has the law on its side thanks to a ruling by U.S. District Judge Neal Biggers Jr. on Friday.

The court ruling came in response to a lawsuit enacted by Richard Barrett, a lawyer for the White-Supremacist Nationalist Movement. The lawsuit, which stemmed from the university's 1997 ban on flags on sticks in the Vaught-Hemingway Stadium, claimed that the ban was a violation of First Amendment rights.

Judge Biggers put the argument to rest, ruling that the ban on flags measuring 12x14 inches, as well as flag sticks was legitimate.

That ban came into effect in the fall of 1997 after former head football coach Tommy Tuberville asked Rebels to refrain from brandishing the Confederate flag at football games. According to Tuberville, it impaired the recruitment of black athletes.

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[1] Excerpted from the official newspaper published regularly in Oxford, Mississippi by the University of Mississippi, submitted as Appendix of Appellant in the Court, below.

The ASB jumped on the bandwagon, using Tuberville's vociferation to spearhead a resolution banning sticks at football games. This carefully-worded resolution was aimed at minimizing the presence of the Confederate flag at football games. The ASB stated that sticks were dangerous, and could cause possible injury to fans.

So now, two years later, what began as an indirect ban on Confederate symbols has been validated by the U.S. District Court. Mark that down as a victory for diversity at Ole Miss.

The disappointing aspect of this victory is the means by which it was attained. Fan safety and football recruitment were the reasons stated by the bans' proponents, while the real issues of diversity and the feelings of the black members of the Ole Miss student body, faculty, and staff were largely ignored as the heart of the issue. It is that the end justifies the means. It's time that Ole Miss acquires the courage and commitment to stand up and account for their means and ends in banning the Confederate flag. Of Ole Miss is committed to diversity, they should say so, and say so with pride – without hiding behind technicalities in the law.

Appendix 34

APPENDIX K

AMENDED COMPLAINT[1]
November 12, 1999

13-1. On or about November 6, 1997, at the Ole Miss - Arkansas football game, Plaintiff stated to Defendants Wood and Sellers, as well as to others thereabouts, that he was displaying a Confederate flag to protest the Stick Ban, James Meredith being forced into the University of Mississippi and Defendant Tuberville for attempting to ban said flag from display in the stadium....

13-2. During said ball game, Plaintiff displayed said flag against the Stadium's back fence, not obscuring anyone's vision, not endangering anyone's safety. not attracting any unusually large crowd and not engaging in any breach of the peace. Many students. fans and supporters [*see* Exhibit "D"] cheered the flag or gave a "thumbs up" to signal approval. Plaintiff in no wise interfered with the playing of the ball game, spectators, officials or anyone else and was about as far removed from the ball fields as possible, within the Stadium.

13-4. The football game has been used for expressive purposes in many ways, for many years. Most memorable is probably in 1962 when Governor Ross Barnett delivered his famous "I Love Mississippi" address in opposition to the admission of James Meredith at the Ole Miss football

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[1] Excerpted from the Amended Complaint, which was verified and attested to by affidavit.

game in Jackson, Mississippi. Barnett, also, at that time, waved a Confederate flag on a stick at the ball game [*see* Exhibit "A"]. During most of the entire history of the University of Mississippi, the Confederate flag has been involved with students, policy, discussion and activities and continues to be a focal point of interest, both on campus and elsewhere, lately over whether the banner is offensive to minorities and whether it should or can constitutionally be banned or limited. The Confederate flag is frequently displayed in the Stadium as a protest against attempts to ban it and has been passed out for years by officials and fans. The Stadium has been and is a public forum within which the Confederate flag has been a constant symbol of speech and protest, held and waved by students, fans and protesters.

13-5. In the fall of 1997, various individuals and groups began calling for the Confederate Flag to be banned or limited. Defendant Khayat stated, which was widely reported in the news, that he doubted that a ban would be constitutional, though he lent his support to efforts to curb the banner. Defendant Tuberville began a campaign [Exhibit "J"] to keep the flags out of the Stadium. He announced, and was widely quoted in the press, that he wanted to "educate" people about the "hurt" caused by the flags. He appealed for people not to bring flags and to not accept flags from others at the ball games. Various individuals were quoted in newspapers and elsewhere that the flag was "offensive" to minorities or that displaying the flag is a "constitutional right."

13-6. According to Defendant Boone, in published

reports, the Stick Ban was issued prior to the Alabama Game on campus but "not enforced" [Exhibit "K"], insofar as that students, fans and spectators waved their Confederate Flags in protest, openly and defiantly, against the ban. Boone vowed in an interview with the *Ole Miss Spirit* newspaper that he would send security people into the stands to enforce the ban at the following game, November 6th, which he did. Boone said that his reason for "enforcing" the ban was to prevent "Ole Miss people turning on each other or arguing among themselves." Considerable discussion had been directed on campus, across the state and even across the nation (because the news of the Stick Ban made national news) to the claim that minorities were being discouraged from being on the football team because of the flag. Out of 19 new players, however, 13 were minorities [Exhibit "L"].

13-7. At the said incident on November 6, 1997, Defendant Woods approached Plaintiff and threatened to take Plaintiff's flag down, to return it after the ball game, which Plaintiff refused..... Plaintiff pointed out that the flag was part of a protest against the Stick Ban and James Meredith and in support of Mississippi Heritage.... Woods then stated that the reason for the regulation was because a "certain" minority group objected to the display of the flag. Plaintiff protested that he was entitled to freedom of speech, that the size regulation was ambiguous and arbitrary....

13-11. During said incident, Plaintiff offered Defendant Sellers that he would display his flag at any other or reasonable place in the Stadium. Sellers stated that the flag

could be displayed at The grove and that Plaintiff "should go there now." Asked how close The Grove was, Sellers stated that it was on the other side of the campus and that "no one is there now." Plaintiff objected that such a plan was not a constructive or constitutional alternative and respectfully declined.

13-12. At the November 6th event, flags could generally not be seen and signs of protest or speech, highly visible at previous games, were not evident. The ban on flag spectacle ... was particularly deleterious when the event was broadcast by national television. Cameras can readily pick up flags being waved and waving flags can be seen much better than being held or couched beneath benches and clothing.